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Human rights of migrants

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, in accordance with Human Rights Council resolution 34/21.

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Report of the Special Rapporteur on the human rights of migrants

Summary

The present report outlines the main activities undertaken by the Special Rapporteur on the human rights of migrants since the most recent report to the General Assembly. The report contains a study on effective access to justice for migrants, which includes the right to information and interpretation, legal aid and representation, consular assistance and access to remedies and redress. The study analyses the obstacles faced by migrants in their access to justice and stresses the need to foster the establishment of "firewall" protections to safeguard this right. In addition, the study contains recommendations to States to ensure effective access to justice for migrants, including those with particular protection needs.

I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the human rights of migrants pursuant to Human Rights Council resolution 34/21.

II. Activities[1]

2. On 11 May 2018, the Special Rapporteur gave a lecture on migration policy and human rights at the Autonomous University of Madrid. On 17 May, he was a keynote speaker at a conference on trafficking and corruption at Carlos III University, Madrid.

3. From 4 to 8 June 2018, the Special Rapporteur participated in the annual meeting of special procedures in Geneva. On 13 June, he participated in a panel discussion on human mobility in times of populism at American University, Washington, D.C.

4. On 20 June 2018, the Special Rapporteur presented his first thematic report to the Human Rights Council (A/HRC/38/41) on the return and reintegration of migrants. On 22 June, he participated as a speaker at a side event organized by the non-governmental organization (NGO) World Alliance for Citizen Participation (CIVICUS) on the shrinking of civic space in the European Union and the criminalization of assistance to migrants.

5. From 9 to 13 July 2018, he attended the last round of negotiations on the Global Compact for Safe, Orderly and Regular Migration in New York.

6. On 18 July 2018, he participated in a conference in San José, Costa Rica on the fortieth anniversary of the entry into force of the American Convention on Human Rights and the establishment of the Inter-American Court of Human Rights, during which he delivered a presentation as a member of a panel discussing contemporary global challenges for human rights protection systems.

III. Effective access to justice for migrants

A. Introduction

7. Effective access to justice means that everyone, without discrimination, has the right to access the system provided for conflict resolution and the restoration of rights. Access to justice has a dual role, as a fundamental right inherent to every person and as a principle that establishes obligations for States, particularly to ensure that anyone can approach the courts to seek protection of their rights. States, under international human rights law, have an obligation to guarantee the human rights of all individuals under their jurisdiction, regardless of their nationality or migration status, including the right to access to justice and due process.[2]

8. The following sections analyse the rights and key elements that make up effective access to justice, such as the right to legal aid and representation, the right to information and an interpreter, the right to consular assistance, the competent authority to which access is provided, as well as remedies and redress. These guarantees of due process are applicable to all migrants, regardless of their migration status, to enable them to claim their rights in migration procedures or asylum

[1] For activities between August 2017 and April 2018, see A/HRC/38/41.

[2] International Covenant on Civil and Political Rights, art. 2.

applications, or in the case of detention or expulsion, labour exploitation or any other violation of their human rights.

9. Contributions to the study were made by a number of civil society organizations, as well as teams of lawyers from Diego Portales University, Santiago and Carlos III University, Madrid.

B. Legal assistance and representation

10. Legal representation of persons stems from the concept of due process, both of which are enshrined in the Universal Declaration of Human Rights. Articles 7, 8 and 11 provide that all persons are equal before the law and are entitled to equal protection under the law. The Declaration also provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating their fundamental rights" (art. 8). It may be inferred from article 10 of the Declaration that this requires specialized legal aid and representation, free of charge for those who cannot access it. The International Covenant on Civil and Political Rights prescribes that migrants in a regular situation may be expelled only in pursuance of a decision reached in accordance with law, so that they may submit the reasons against their expulsion and be represented before the competent authority (art. 13). It adds that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal" (art. 14). The Special Rapporteur stresses that migrants enjoy a right to technical legal assistance, which should be provided by the State free of charge for those who cannot afford it, to truly operationalize the right to due process.

11. The African Charter on Human and Peoples' Rights stipulates that the right to a fair trial includes the right to be defended (art. 7). The African Union has adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which set forth the right to equal access to lawyers and free legal aid, and in its Migration Policy Framework for Africa and Plan of Action 2018–2027, the Union emphasizes strengthening legal assistance for migrants who are victims of smuggling, organized crime and trafficking in persons. In addition, the right to be defended in administrative cases has been established, meaning that free legal assistance must also be provided in migration procedures.[3]

12. The Charter of Fundamental Rights of the European Union includes the obligation to develop an effective system of access to justice, which encompasses the right to have the possibility to be advised, defended and represented. In addition, it refers to free legal assistance for those who do not have sufficient resources. European case law has established that the State must guarantee access to justice, de jure and de facto, so that if it does not provide a free legal aid system, it must inform the applicant about organizations that do so.[4]

13. The European Union has ruled that States parties must facilitate the provision of advice on the asylum procedure and on the rights and obligations of the applicants in their own language. However, free legal assistance has been limited to those applicants whose applications has received a negative response.[5] According to reports from civil society, rights such as free legal assistance, information and translation

[3] For case law in the African region, see 224/98, *Media Rights Agenda v. Nigeria*, *14th Annual Activity Report* [*Compilation 1994–2001*, Institute for Human Rights and Development in Africa, Banjul, 2002, pp. 286–300], in which the African Commission on Human and Peoples' Rights applied general comment No. 13 (1984) of the Human Rights Committee on the administration of justice, with regard to legal assistance.

[4] European Court of Human Rights, *M.S.S. v. Belgium and Greece*.

[5] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), art. 39.

have not been, nor are they currently, fully guaranteed in Germany,[6] France,[7] Greece,[8] Hungary[9] or Italy.[10]

14. The American Convention on Human Rights recognizes, in its article 25, the right to judicial protection, which safeguards the right to legal representation. That right is protected by providing efficient and equitable legal assistance for those in need. Article 8 of the Convention provides that all accused persons have the right to defend themselves personally or to be assisted by counsel of their own choosing and to communicate freely and privately with their counsel. The Inter-American Court of Human Rights has found that "due process of law is a right that must be ensured to all persons, irrespective of their migratory status".[11]

15. The Special Rapporteur stresses the fundamental role of NGOs, university legal clinics and law firms that take on pro bono work, among others, in the legal representation of migrants. Nevertheless, he recalls that this does not free the State from its responsibility to provide free legal assistance and representation.

16. The protection of access to justice and its relationship to due process is particularly relevant in cases of forced displacement and the determination of refugee status. The risk of a person being returned to a place where his or her life or liberty is threatened means that States must take particular account of these protections, especially the principle of non-refoulement, in order to avoid violating the person's human rights. Although the Convention relating to the Status of Refugees of 1951 does not expressly establish a right to due process in the procedures for recognition of refugee status, international human rights standards in the area of procedural safeguards are applicable.

C. The right to information and an interpreter

17. The right to information is essential for the exercise of other rights, including access to justice. NGOs and international organizations provide information and raise awareness among migrants regarding their right to access to justice through the production and dissemination of explanatory materials on the rules that protect migrants. Of note among such initiatives is the "Contratados.org" digital platform created by Centro de los Derechos del Migrante (centre for migrant rights) to increase transparency in the hiring of migrants. The Centre also conducts leadership programmes to empower migrant workers in their demands for justice, through community leaders who sit on migrant defence committees. Organizations such as the Centre also advise migrants and connect them with networks of NGOs, lawyers and public servants that provide legal support.[12] Often migrants are not properly informed

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[6] European Union Agency for Fundamental Rights, *Monthly migration report*, December 2017.

[7] Asylum Information Database, France (2017), available at http://www.asylumineurope.org/reports/country/france/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/age-assessment.

[8] AITIMA, Greece (2017), *Asylum seekers on hold: Aspects of the asylum procedure in Greece*, April 2017; see also European Court of Human Rights, *M.S.S. v. Belgium and Greece*.

[9] Asylum Information Database, Hungary (2017), available at http://www.asylumineurope.org/reports/country/hungary/asylum-procedure/procedures/regular-procedure # footnote19_nj2htk4.

[10] Centro operativo per il diritto all'asilo, *Diritto di asilo. Regole ed eccezioni nella prassi della Pubblica Amministrazione: Il monitoraggio di Coda sul territorio di Roma*, October 2015, p. 24; Asylum Information Database, *Country Report Italy*, 34.

[11] Inter-American Court of Human Rights, Advisory Opinion 18/03 of 17 September 2003 on the juridical condition and rights of undocumented migrants, para. 121; see also Inter-American Court of Human Rights, *Nadege Dorzema et al. v. Dominican Republic*, Judgment of 24 October 2012.

[12] Submission by Centro de los Derechos del Migrante.

about how their data will be processed and find it difficult to understand the information they receive.[13]

18. In order to ensure effective access to justice for migrants, States must make available the necessary economic and human resources to provide them with information in a language they can fully understand on the procedures and procedural safeguards they can call upon if their human rights are violated. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families recognizes the right of migrants to be assisted free of charge by an interpreter if they are arrested (art. 16) or charged with a criminal offence (art. 18). The Committee on the Elimination of Discrimination against Women also recommends that States remove linguistic barriers by providing independent and professional translation and interpretation services, when needed, in order to guarantee the full understanding of judicial processes. [14] The Human Rights Committee has referred to the obligation of States to ensure that persons seeking international protection are given access to an interpreter as a guarantee of due process and has also referred to the obligation to respect the principle of non-refoulement.[15]

19. The Inter-American Court of Human Rights has stressed the obligation to provide an interpreter "when one is unfamiliar with the language in which the proceedings are conducted".[16] It also has indicated that States must take into account the basic procedural guarantees in keeping with the principles of the child's best interest and comprehensive protection, which include provision of an interpreter, if required, who is highly qualified to interview children.[17]

20. The European Court of Human Rights has noted that, when migrants are detained, they have the right to receive information in a language that allows them to understand the reasons for detention, the procedure and the procedural safeguards that can be invoked.[18] According to information from the European Union Agency for Fundamental Rights, the police provides free interpretation to migrants in most (26) of the States in the Union. The African Commission on Human and Peoples' Rights, in its resolution on the right to recourse and to fair trial, has established that the right to a fair trial includes the right to the free assistance of an interpreter.[19]

D. The right to consular assistance

21. Consular assistance is also essential for effective access to justice for migrants. It is particularly urgent in the case of persons deprived of their liberty, whether for criminal or immigration reasons, as it often has a decisive impact on respect for procedural guarantees. The Vienna Convention on Consular Relations establishes that if the interested party "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner (art. 36, para. (b)). This is

[13] Submission by the European Union Agency for Fundamental Rights.

[14] See general recommendation No. 33 (2015) on women's access to justice.

[15] See CCPR/C/MLT/CO/2.

[16] Inter-American Court of Human Rights, Advisory Opinion No. 16/99 of 1 October 1999 on the right to information on consular assistance in the framework of the guarantees of the due process of law, para. 120.

[17] Inter-American Court of Human Rights, Advisory Opinion No. 21/14 of 19 August 2014 on the rights and guarantees of children in the context of migration and/or in need of international protection.

[18] European Court of Human Rights, *Saadi v. Italy*.

[19] Available at http://www.achpr.org/sessions/11th/resolutions/4/.

stipulated in article 16, paragraph 7, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Consular assistance is also very important in the area of employment, as migrants are often victims of workplace abuses that may be as serious as trafficking and exploitation. Hence the importance of States providing consular assistance in this regard, through the creation of labour attaché offices or other mechanisms.

22. The right to consular assistance is primarily a right of migrants and only a conditional right of the State of origin because migrants may prefer not to contact their State out of fear of persecution or other reasons. The receiving State has an obligation, inter alia, to inform migrants detained under their jurisdiction without delay of their right to be assisted by consular officials of their country of nationality and of their right to communicate with the consular authorities of their country, as well as to receive effective consular assistance. This was noted by the International Court of Justice, when it declared that article 36 of the Vienna Convention on Consular Relations establishes individual rights that may be claimed by the national of the sending State and that create an imperative for the receiving State, which is why the obligation goes beyond relations among States and refers to the protection of a human right.[20] The Inter-American Court of Human Rights has ruled in the same fashion.[21] For their part, European Union treaties provide for the possibility that a national of a member State located in a country outside of the State of origin and that does not have diplomatic representation may receive the consular protection of a European Union member State and that the treatment accorded must be the same as that which a national of that State would receive.[22]

23. In practice, migrants often find that their consulates abroad are unable to help them. Embassies often lack effective communication mechanisms, do not provide adequate support to ensure free legal assistance and tend not to become involved in detention cases. Moreover, they are usually not informed of the detention of their nationals, with the result that they act late and migrants turn to NGOs for assistance. While some consulates offer legal advice on litigation, the practice is not common or sufficiently effective or comprehensive.[23]

E. Competent authorities

24. The type of authority to which individuals have access in immigration relations with the State directly affects the exercise of effective access to justice. In cases of refusal of entry, asylum applications and deportation, access is provided only through an administrative authority in some States. In other cases, access is provided to both an administrative and a judicial authority through procedural remedies. Some States also provide for the possibility of directly addressing a judicial authority. For example, the rules in the United States of America are unique because immigration judges do not belong to the judicial branch but rather report to the Office of the Attorney General. In certain cases, it is possible to petition a federal court of appeals; such courts are part of the judicial branch.

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[20] International Court of Justice, *The Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures of 9 April 1998; *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001; *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004.

[21] Inter-American Court of Human Rights, Advisory Opinion No. 16/99 of 1 October 1999, on the right to information on consular assistance in the framework of the guarantees of the due process of law; *Case of Vélez Loor v. Panama*; Judgment of 23 November 2010, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014.

[22] Treaty on the Functioning of the European Union, art. 23.

[23] Submission by Migrant Forum Asia.

25. The administrative remedies available in some States provide for the review of decisions by superior bodies, usually the Ministry of Justice or a collegiate body composed of representatives of the executive branch. In a few cases, countries are directly supported by the Office of the United Nations High Commissioner for Refugees (UNHCR) or academic experts. When administrative decisions are reviewed by authorities attached to the executive branch — especially the Ministry of the Interior, which is directly involved in matters of order and security and, thus, criminalization — this may endanger the human right to an effective remedy in accordance with international human rights standards,[24] as it prevents an impartial analysis of the status of the foreign national.

26. In the European Union, Directive 2008/115/EC on common standards and procedures in member States for returning illegally staying third-country nationals establishes minimum common legal safeguards for decisions pertaining to the return of irregular migrants that are not respected by all member States. It prescribes, inter alia, that decisions on return, entry bans and removal shall be issued in writing and include reasons in fact and in law and information about available legal remedies. Further, while enshrining the effective right to lodge an appeal before a judicial body, an administrative authority or other competent body, it requires that the review body be composed of impartial members whose independence is guaranteed, which is difficult to enforce when a review is purely administrative.

27. This European directive has also been criticized because a postponement of the removal decision is established only as a possibility and not an obligation, which has allowed a person to be removed immediately after being notified of a decision.[25] In the case of Directive 2005/85/EC on minimum standards on procedures in member States for granting and withdrawing refugee status, there is a stricter requirement, because it establishes the obligation to provide for the right to a judicial review of administrative decisions on asylum.

28. The three immigration procedures identified are subject to different rules. There is greater regulation of asylum and removal procedures and less regulation of denial of entry, which is generally a step taken by border immigration authorities that form part of the executive branch. Regulations are often confusing and require the analysis of other normative instruments to determine whether they allow for appeals and under what terms, hindering the proper exercise of rights, which is exacerbated when laws are in a language other than the native language.

29. In countries that do not allow for appeals of administrative decisions before a judicial authority, decisions to deny entry and remove persons are not always contained in an administrative act and are only communicated verbally by the representative of the immigration authority to the foreign national, resulting in a lack of certainty about the reasons for the act and undermining the right to a defence.

30. In some countries that allow for appeals against administrative decisions through the courts, notice of refusal of entry is given verbally and is not subject to any kind of appeal, which is an exception to the general rule of a well-founded administrative act as provided for by the majority of countries, which allows for the proper exercise of the right to a defence. Other countries provide for direct access to

[24] International Covenant on Civil and Political Rights, art. 2, para. 3 and American Convention on Human Rights, art. 25, para. 1. Similarly, general comment No. 15 (1986) of the Human Rights Committee, on the position of aliens under the covenant, indicates that "an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of art. 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require" (para. 10).

[25] See Court of Justice of the European Communities, *Dem'Yanenko* case.

the courts without a prior administrative appeal. In such cases, migrants have access to administrative courts, sometimes with the right of appeal to a higher court. Some systems provide for the possibility of access to the high court. Italy has recently established a special section on immigration, international protection and free movement of citizens.

31. Access to a judicial review of the detention of migrants and asylum seekers is also impeded by the elimination of procedural safeguards such as ex officio judicial reviews of detention orders and the poor prospects for a successful appeal against such orders while the person is in a detention centre prior to removal.[26]

32. In recent years, some States have adopted reforms affecting the independence and effectiveness of the bodies that review negative asylum decisions. For example, in Greece, following the adoption of the agreement between the European Union and Turkey on 18 March 2016, the composition of the review body was amended, affecting the way in which it rules on appeals against decisions deeming applications for asylum inadmissible based on the "safe third country" concept. Derogations from the general rules of administrative procedures may also occur in the bodies that review asylum applications, to the detriment of applicants. For example, several countries have limited the range of circumstances in which a review is available to asylum seekers in order to expedite proceedings.[27]

F. Firewall protections

33. "Firewalls" establish a strict and real separation between immigration enforcement and public services, meaning that immigration authorities cannot have access to information regarding the migration status of visitors to public services, and that the institutions responsible for providing such services are not required to investigate or share information on the migration status of their users.[28] These institutions include service providers in the fields of education, health, social security, social assistance and labour protection, as well as the police and the judicial system. As the only mechanisms that allow migrants to exercise and enjoy their human rights without fear of being reported to the immigration authorities, "firewalls" are an inescapable consequence of the State's obligation to protect all persons under its jurisdiction against discrimination, in accordance with international human rights norms and standards.[29]

34. The establishment of "firewall" protections is key to ensuring migrants' access to justice. One of the reasons for their difficulty in having access to an effective remedy before the courts is their fear that their migration status will be discovered during the proceedings and that they will be detained and subsequently deported.[30] In this regard, "firewalls" allow migrants who are in an irregular situation and are afraid of being discovered and deported, or those who are in a precarious legal situation and afraid of ending up in an irregular situation, to report offences as either victims or

[26] Submission by University of Texas School of Law, Human Rights and Immigration Clinics, Locking up Justice.

[27] Submission by the International Commission of Jurists (ICJ)/European Council on Refugees and Exiles (ECRE).

[28] François Crépeau and Bethany Hastie, "The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights", *European Journal of Migration and Law*, vol. 17, 2015, p. 165.

[29] Council of Europe, European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination, adopted on 16 March 2016* (2016), 16.

[30] A/HRC/26/35, paras. 19, 57, 100 and 103.

witnesses, obtain legal assistance and gain access to the courts to defend their rights, which, moreover, helps to fight impunity.[31]

35. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has affirmed that the establishment of "firewalls" to protect such workers in their interaction with public authorities is one of the measures that should be taken by States.[32] Furthermore, joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration notes that "States parties should implement a 'firewall' and prohibit the sharing and use for immigration enforcement of the personal data collected for other purposes, such as protection, remedy, civil registration and access to services".[33]

36. In terms of labour protection, the International Labour Organization (ILO) has noted that "firewall" protections are needed between the authorities responsible for labour inspections and the immigration authorities, to ensure that migrant workers who suffer abuse have access to effective remedies and redress, including financial compensation.[34]

37. The United Nations High Commissioner for Human Rights (UNHCR) has also recommended that States include explicit guarantees for the protection of personal data in information-sharing agreements concluded between States, as well as between agencies within the same State. These guarantees should include establishing "firewalls" between immigration authorities and public services.[35]

1. Laws, policies and practices that foster firewall protections

38. Despite the fact that the current global context — characterized primarily by a security-centred approach and the criminalization of irregular immigration — is largely at odds with the existence of "firewalls" between public services and immigration authorities, it is possible to identify some good practices, most of which tend to occur at the local and regional levels.[36] These are the levels at which a greater number of public services are provided, and which are generally not responsible for immigration enforcement or the implementation of immigration legislation. Of note in that regard are measures designed to encourage or ensure migrants' access to public services and their participation in the community, as well as the laws and practices

[31] The European Union Agency for Fundamental Rights, *Apprehension of migrants in an irregular situation*, 2013.

[32] A/69/48, para. 16.

[33] Para. 17. At the European regional level, see also the European Union Agency for Fundamental Rights, *Apprehension of migrants in an irregular situation*, 2013 and ECRI, *General Policy Recommendation No. 16*, 2016, p. 15.

[34] International Labour Organization (ILO), Committee of Experts on the Application of Conventions and Recommendations, *Promoting fair migration — General Survey concerning the migrant workers instruments*, report III (1B), 2016, paras. 480–482.

[35] Office of the United Nations High Commissioner for Refugees (UNHCR), *Recommended Principles and Guidelines on Human Rights at International Borders*. See also A/HRC/37/34/Add.1.

[36] For example, see United Nations Children's Fund (UNICEF), *Beyond borders: how to make the global compacts on migration and refugees work for uprooted children*, 2017, p. 26, where it is noted that "in cities including Geneva, Munich and Seoul, the solution has been to establish 'firewalls' that keep information from being shared between service providers and immigration authorities".

that explicitly prohibit the transfer of information and abolish the obligation to report the irregular migration status of individuals.[37]

39. Laws and practices that clearly prohibit the transfer of information and abolish the obligation to report the irregular migration status of individuals allow public employees to have legal certainty when exercising their functions and help to reduce the fear that migrants have concerning access to public services. Such measures have been taken in some European States, particularly with regard to health and education services. In Greece and Italy, for example, where no prohibitions existed against reporting irregular migrants, civil society has mobilized to protect migrants. Some municipalities and regional entities, particularly in the United States, have adopted laws that explicitly state a refusal to collaborate with immigration authorities.[38] This is the case with so-called "sanctuary cities", where a city or jurisdiction becomes a safe haven for migrant families. By not implementing immigration laws or refusing to share information with immigration authorities, sanctuary cities allow families to access public services without fear of suffering harm. While sanctuary cities do not provide total protection, given that immigration authorities can still have access to them, the legislation adopted by each State to protect its residents can be of great help to immigrants who urgently require public services.[39]

2. Laws, policies and practices that hinder or restrict firewall protections

40. Identity checks, allegedly conducted at random to detect migrants in an irregular situation, are quite prevalent in Canada, the United States and Europe. These checks are often carried out as part of routine traffic checks or in public places, such as on public transport or in schools or health centres, thus making it difficult to establish "firewalls" between those services and immigration authorities. Furthermore, it has been alleged that such checks are discriminatory as they target certain nationalities and ethnic groups.[40]

41. The obligation to report migrants in an irregular situation primarily exists in those States in which an illegal entry or stay in the country is a criminal offence. Even in States where it is not a crime, certain individuals, including health officers, school personnel and landlords, have an obligation to report an irregular situation when they become aware of it. The same applies to the creation of shared databases and the establishment of legal obligations to share information concerning persons in irregular migration situations. An example of these kinds of practices is the "Secure Communities" programme in the United States, which makes it possible to ascertain the migration status of all persons arrested in the country, in order to identify those who are in violation of immigration laws.[41] In the United Kingdom, the laws and policies that impede firewall protections have adversely affected the exercise by migrants in an irregular situation of their social rights, such as health and education.

42. Lastly, inspections and raids conducted in certain locations to identify migrants in an irregular situation become particularly problematic when they occur in the workplace or near the public and social services to which migrants are entitled or need access.[42]

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[37] Crépeau and Hastie, "The Case for 'Firewall' Protections for Irregular Migrants", pp. 176–182.
[38] Ibid., pp. 18–182.
[39] D. Feinstein, J. Flake and D. Vitter, "Sanctuary Cities", *Congressional Digest*, vol. 94, No. 7, 2015, p. 13.
[40] Crépeau and Hastie, "The Case for 'Firewall' Protections for Irregular Migrants", pp. 170–172.
[41] Ibid., pp. 172–173.
[42] Ibid., pp. 173–176.

G. Obstacles to effective access to justice

43. Facilitation of arrival in or entry into the territory of a State is a crucial part of ensuring that migrants have access to justice. In recent years, in many countries and regions of the world, a number of measures have been taken — readmission agreements, exceptions to safe country status, expulsion and non-admission, and the establishment within national territory of areas in which the normal legal rules do not apply and in which non-admission is presumed — that undermine or obstruct effective access to justice for migrants. These measures, which are aimed at expediting the return of migrants, often deprive migrants of their right to seek international protection and have their cases considered individually on the basis of procedural guarantees. Such measures are therefore incompatible with the principle of non-refoulement.[43]

44. Another method States resort to in order to limit access to justice in migration and expulsion procedures is the creation of exceptions on national security grounds. Such exceptions are then invoked to carry out expulsions in lieu of conducting extradition proceedings subject to judicial review. In general, the definition of national security, public order or public policy in migration law that is invoked to carry out expulsions is extremely vague and thus has an impact on due process and the principle of non-refoulement.[44]

45. The specific challenges faced by asylum seekers in gaining access to justice include expedited asylum procedures with fewer safeguards and limited ability to appeal denied asylum applications. For example, in the European Union, the deadlines for appealing decisions to deny asylum at the first-instance level vary from one country to another, ranging from one week to two months in regular procedures. In addition, special procedures may be applied depending on the asylum seeker's profile, migration route and point of entry, with more limited safeguards than those provided for under the regular procedure (that is, shorter time frames within which to appeal a decision not to grant asylum, detention of asylum seekers pending appeal and lack of access to legal assistance). In some countries, derogations from the general rules applicable to asylum seekers have been declared unconstitutional (by the Austrian Constitutional Court, for instance).[45]

46. The automatic suspension of the enforcement of a denial of asylum at the first-instance level and of the resulting removal procedure, as well as the right to remain in the country as long as necessary to lodge and obtain a decision on an appeal, constitute fundamental guarantees for asylum seekers. Nevertheless, some States do not automatically grant such suspension, as in the case of individuals whose asylum applications, processed through the expedited procedure, have been denied at the first-instance level.[46]

47. The migrant worker population also faces obstacles in gaining effective access to the labour courts when attempting to claim employment salaries and benefits or report discriminatory dismissal or sexual harassment. A lack of information and knowledge concerning their rights and how to exercise them in the legal system; an irregular migration status and the resulting fear of seeking remedies from the courts; economic and time constraints; the unavailability of free legal advice; and mistrust of the justice system constitute the main obstacles. Migration status is a significant

[43] Submission by ICJ/ECRE.
[44] Ibid.
[45] Ibid.
[46] Ibid.

factor in access to justice: individuals whose situation is irregular face greater barriers to access.[47]

48. Migrants who are temporary workers also face hindrances in gaining access to justice, given that the return to their countries of origin stipulated by temporary labour migration programmes creates a geographical barrier to claiming their rights. The 2014 legislation adopted by the State of California (United States) provides an example of good practice in strengthening migrant protection in the area of recruitment. The law requires the employer to utilize only recruitment agencies registered in the state, prohibits the collection of recruitment fees from workers and stipulates that workers must be given contracts at the time of recruitment. This makes employers more accountable for labour abuses.[48]

49. Other forms of abuse endured by migrants include confiscation of their documents and denial of the right to an interpreter.[49] They are also subject to mass expulsions following visa raids, as has been the case in Kuwait, Oman, Saudi Arabia and United Arab Emirates. However, destination States do not investigate the reasons and circumstances leading to the irregular situation or establish to what extent sponsorship and recruitment agencies may be responsible.[50]

50. In general, men migrant workers are more likely to bring claims in court than women migrant workers. This gender gap, which is larger in rural areas, is attributable mainly to a lower level of empowerment among women, who also have limited access to information about their rights and face time constraints, particularly in the case of domestic workers. Indigenous migrants also have very limited access to labour courts, owing generally to linguistic and cultural barriers and to public institutions' lack of awareness and knowledge of the specificities of indigenous peoples. Another contributing factor is the perception among indigenous migrants that the judicial system is alien to their own traditional conflict resolution methods.[51]

51. Family members of migrants who have disappeared on the migratory route also face challenges in pursuing justice. In Mexico, for example, cases are rarely reported, and it is impossible, without a mechanism for coordinating response between Mexico and the countries of origin of missing migrants, to assess the extent of the phenomenon, although it is believed to be massive. The institutional shortcomings that prevent family members from gaining access to justice and obtaining reparation include a lack of coordination between countries of origin, transit and destination; delays in conducting investigations and searches for missing persons, and a lack of transnational investigations. In response, family members of migrants who have gone missing in El Salvador, Guatemala, Honduras, Mexico and Nicaragua have formed committees. Family members also suffer the traumatic consequences of a lack of due diligence in the forensic identification of their loved ones.[52]

52. Migrants are also victims of hate crimes because of racial discrimination, xenophobia and other reasons. Such incidents are generally not reported out of fear and distrust of the police, which hinders migrants' access to justice.[53]

53. Migrants who are victims of trafficking are deeply distrustful of the justice system, which they perceive as corrupt. They are also afraid of the police. As a result,

[47] Submission by ILO and the judicial branch of the Government of Costa Rica.

[48] Submission by the International Labour Recruitment Working Group.

[49] Submission by University of Texas School of Law, Human Rights and Immigration Clinics, Locking up Justice.

[50] Submission by Migrant Forum Asia.

[51] Submission by ILO and the judicial branch of the Government of Costa Rica.

[52] Submission by the Mesa de Coordinación Transfronteriza "Migraciones y Género" (cross-border coordination bureau "migration and gender").

[53] Submission by the European Union Agency for Fundamental Rights.

they turn to other migrants or their families for help. As recruitment agencies are often involved in trafficking and exploitation, victims believe that the agencies are acting with impunity owing to corruption.[54] In addition, many recruitment agencies operate from a third country in order to circumvent the labour courts of the country in which migrants are working.[55] Thus, victims of trafficking rarely turn to the justice system or prefer to accept lower amounts of compensation.[56]

54. There are also many institutional barriers. While establishing that a person has been victimized is the first step towards gaining access to justice, it proves difficult to do so, owing to the authorities' lack of specialized knowledge and awareness, a lack of awareness on the part of the general public, and the shortcomings of the institutions and services responsible for providing assistance. As a result, many victims of trafficking are treated as undocumented migrants and deported. The lack of information and knowledge (concerning the legal consequences of being recognized as victims, for example) on the part of victims and authorities, the lack of accessible legal assistance (in rural and remote areas, for instance), and the duration and cost of criminal proceedings are additional barriers that hinder migrants who are victims of trafficking from gaining access to justice.[57] In West and Central Africa, one of the main challenges rescued victims face is the absence of a safe location and environment for them while receiving legal assistance.[58]

55. In addition, obtaining compensation is a major challenge. It is generally easier to obtain compensation in the labour courts than it is to obtain it in the criminal courts for trafficking offences. Labour litigation is speedier, the labour courts authorize direct payment of compensation to migrants and punishment of those responsible, while the definition of exploitation is broader (for example, there is no obligation to prove intent). However, in many cases the amounts available are completely inadequate considering the harm caused, contrary to what is stipulated in anti-trafficking laws, which also allow for compensation for non-material damage.[59]

56. Very few victims of trafficking have obtained compensation in criminal proceedings owing to the difficulties of investigating transnational cases and the insufficient support provided to victims throughout the process.[60] Embassies' slow pace of work and their failure to undertake effective follow-up of the proceedings, even when a favourable judgment has been handed down, also hinder effective access to justice and redress for migrants returning to their countries of origin.[61]

57. According to some studies, a real possibility of regularization of residence status, the provision of individualized support services, a genuine chance of receiving compensation and access to and participation in criminal proceedings are the factors that would enable migrants to escape abuse and exploitation and afford them access to justice. In any event, States should not require migrants who are victims of trafficking to cooperate with the justice system in order to receive assistance.[62]

[54] Submission by Global Alliance Against Traffic in Women.
[55] Submission by the International Organization for Migration (IOM).
[56] Submission by Global Alliance Against Traffic in Women.
[57] Ibid.
[58] Submission by IOM.
[59] Submission by Global Alliance Against Traffic in Women.
[60] Submission by IOM.
[61] Submission by Migrant Forum Asia.
[62] Submission by the European Union Agency for Fundamental Rights.

H. Migrants with particular protection needs

1. Migrant children

58. Children and adolescents are one of the weakest links within migratory flows, especially if they are not accompanied by their parents, relatives or a responsible, trustworthy adult who protects them from abuse, violence and exploitation and other risks. If this is compounded by the lack of information that a child or adolescent may have regarding complaint mechanisms and the institutions to which they can turn in the event of a violation, if they are unable to read or write, or if they are in a society that fails to consider their views owing to their young age, the right of access to justice and the protection thereof by States acquires particular importance.

59. In relation to children and adolescents deprived of their liberty, the Convention on the Rights of the Child enshrines the right to prompt access to legal and other appropriate assistance, and the right to a fair trial (art. 37). The Committee on the Rights of the Child has established that one of the first decisions of the State with regard to unaccompanied children and children separated from their families outside their country of origin must be the appointment of a guardian or adviser and legal representative as soon as possible, since this is the most effective mechanism for protecting the best interests of children and adolescents and ensuring access to justice.[63] Furthermore, it establishes, as an essential element, "specialized units within the police, the judiciary, the court system, the prosecutor's office, as well as specialized defenders or other representatives who provide legal ... assistance to the child".[64] When it comes to children and adolescents, access to justice must be understood from the perspective of their best interests, which requires the removal of obstacles to access to justice, including the lack of affordable and child-sensitive complaint mechanisms, technical language, mistrust of adults, and the inability to read or write.[65]

60. The Council of Europe has developed international norms and standards on migrant children in several instruments, including the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice. The Handbook on European law relating to the rights of the child also points out the need to adapt justice to children's needs, especially if they are migrants. In 2017, the European Union Agency for Fundamental Rights compiled Agency guidelines and opinions, and testimonies of children and adolescents to build and strengthen child-friendly justice. In that regard, States must make efforts to learn about the special needs of children and their perception of justice and the institutional framework.

61. Unaccompanied migrant children face many difficulties in gaining access to justice, such as a lack of access to guardians and to legal assistance and counselling; a lack of access to information or procedures for determining the best interests of the child; and problems with age assessment procedures. The first step towards implementing laws and policies for the protection of children is their identification as minors. In spite of established standards on fair and appropriate age assessment procedures, many States resort to invasive tests (such as medical examinations or X-rays), the reliability of which is highly questionable. Furthermore, the margin of error for these tests is barely mentioned in the results, which impedes the application of the principle of the benefit of the doubt, with many migrant minors being identified as adults and detained. Moreover, there are no methods for challenging the outcomes of these proceedings. Belgium, France, Italy, Malta and Sweden are among the few

[63] See general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin.

[64] See general comment No. 10 (2007) on children's rights in juvenile justice, para. 92.

[65] See also A/72/164, A/HRC/29/26, A/HRC/25/35 and A/HRC/16/56.

countries that offer the possibility of challenging the decision or the outcome of age assessment.[66]

62. The language barrier, which prevents children from maintaining smooth communication with operators or officials, is also an important element. The African Charter on the Rights and Welfare of the Child establishes judicial safeguards for refugee children, asylum seekers, internally displaced persons and persons accused of committing crimes, noting the obligations of States to provide an interpreter and legal assistance and to explain the procedure in a language that the child understands. When these safeguards are provided for children and adolescents, they are able to gain a clear understanding of their situation, of the help they need and how to obtain it. For its part, the judicial or administrative body can clearly identify the legal issue affecting the child and thus provide timely and effective care and advice.

63. Organizations such as the United Nations Children's Fund (UNICEF) provide tailored assistance to unaccompanied migrant children through information, interpretation, legal advice, social support and family tracing and reunification. For example, in Bulgaria, UNICEF noted that unaccompanied child and adolescent migrants were being detained owing to a lack of clear procedures for identifying and assessing the child's best interests, interpreters working with the police, cooperation with the child protection system or availability of social services. The detention of such children and adolescents in Bulgaria decreased significantly in 2017 after a series of measures was adopted. These included the creation of temporary assistance facilities for children and adolescents; the adoption of an effective mechanism for the designation of a guardian and a procedure for determining the best interests of the child; referral mechanisms; safe accommodation; and a legal reform prohibiting the detention of unaccompanied children and adolescents and requiring their referral to the child protection system for child protection measures to be taken, in compliance with the applicable international norms and standards.[67]

64. Another crucial element of access to justice is training judicial and administrative officials and ensuring they acquire the necessary expertise with regard to childhood. The right to due process cannot be effectively applied without an effort to understand elements such as the progressive autonomy of children, their understanding of the world and their non-verbal language, which require special tools to be interpreted. In the inter-American system, the Inter-American Court of Human Rights has ruled on the issue[68] and has adopted the Ibero-American Protocol for Legal Action to improve access to justice for individuals and groups in vulnerable situations, with special emphasis on justice with a gender perspective, of 2014.

2. Migrant women

65. Migrant women have particular protection needs to ensure their effective access to justice in view of the sex- and gender-based discrimination they experience: they are less visible and less protected by virtue of their employment as domestic workers and in the informal sector; they experience discrimination in access to family reunification and naturalization programmes; and they are more likely than men to be detained and criminalized for their migration status.[69] The Committee on the Elimination of Discrimination against Women has noted that women workers have

[66] Submission by ICJ/ECRE.

[67] Submission by UNICEF Bulgaria.

[68] Inter-American Court of Human Rights, Advisory Opinion 17/02 of 28 August 2002 on the legal status and human rights of children, and Advisory Opinion 21/14 of 19 August 2014 on the rights and guarantees of children in the context of migration and/or in need of international protection.

[69] Submission by IOM. Centro de los Derechos del Migrante collects data on women's experiences in connection with sexual harassment and abuse through its Migrant Women Project.

limited access to justice, since they are not always eligible for free legal aid and, in some countries, they may lose their jobs for reporting harassment or abuse. The Committee therefore recommends training and awareness-raising programmes concerning the rights of women workers for State employees.

66. In the African system, the rights of women to justice and equal protection under the law are protected under article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, according to which States parties must ensure that women have effective access to judicial and legal services, including legal aid, and must support initiatives directed at providing women with access to legal services, including legal aid.

67. With regard to access to justice for women who are victims of sexual or gender-based violence, in accordance with the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), States must establish fair and effective legal procedures and ensure effective access to such procedures (art. 7). The Inter-American Court of Human Rights has identified undue delays in investigations and judicial inefficiencies in connection with cases of gender-based violence as obstacles to access to justice.[70] Migrant women face similar obstacles, given the protracted nature of administrative immigration procedures and the gender-based violence they experience in countries of origin, transit and destination.

68. Migrant women who are victims of trafficking often prefer to move on rather than seek justice to avoid the accompanying social stigma, being labelled as victims and the possibility of being traumatized anew. Women caught in the cycle of social stigma are seen not only as victims but also as having violated the community's moral code regardless of the path they choose, which is why women would often rather pretend that nothing happened and not seek redress. Consequently, one of the challenges faced by NGOs and other stakeholders that help migrant women who are victims of trafficking is convincing them that they have experienced a violation of their human rights and are entitled to redress.[71]

69. In the case of migrant women who are employed by diplomatic staff as domestic workers, the power imbalance makes them more vulnerable to exploitation and makes it harder for them to gain access to justice. In some countries, the Ministry of Foreign Affairs and NGOs have worked together to facilitate mediation. Employer participation in such mediation is voluntary, however, and authorities are reluctant to employ effective means of compelling them to take part. In that connection, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has recommended that States designate an ombudsperson for domestic workers to help them have access to redress mechanisms. Furthermore, the Committee encourages States to adopt time-bound or expedited legal proceedings to address complaints submitted by migrant domestic workers, and to conclude bilateral agreements to ensure that migrants have access to justice in their country of employment upon their return to their country of origin, particularly when reporting abuse or claiming unpaid wages and benefits.[72] One example of good practice is the bilateral agreement concluded between Mauritania and Saudi Arabia designed to protect Mauritanian migrant women workers in Saudi Arabia, which allows workers and employers alike to bring labour disputes to the attention of the competent authorities.[73]

[70] Inter-American Court of Human Rights, *Annual Report 2009* and *Annual Report 2014*.

[71] Submission by Global Alliance Against Traffic in Women.

[72] See general comment No. 1 (2011) on migrant domestic workers.

[73] Submission by IOM.

70. Sex workers, whose line of work is criminalized as well as stigmatized, constitute another group of migrant women who face particular difficulties in gaining access to justice. Furthermore, laws and policies to combat trafficking in persons are often used to identify, detain and deport undocumented migrants without providing them with either assistance or compensation.[74]

IV. Conclusions and recommendations

71. Under international law, States have a duty to protect migrants at all stages of the migratory process and to provide them with access to justice to obtain redress for any discriminatory treatment or human rights violations that they experience. Effective access to justice includes as guarantees of due process the right to legal aid and legal representation, the right to information and to an interpreter, the right to consular assistance, and access to remedies and redress. In addition, firewall protections are essential mechanisms that allow migrants to exercise their human rights without fear of being reported to the immigration authorities.

72. In practice, however, migrants face a multitude of barriers that restrict or impede their effective access to justice. This is due in large part to the fact that migration laws, policies and practices are focused on security and the deterrence and criminalization of irregular migration, which has a negative impact on the human rights of migrants. The worrying trend of detaining immigrants as a border management tool is a clear example of a practice that hinders their effective access to justice.

73. In the New York Declaration for Refugees and Migrants, States committed to combating discrimination against refugees and migrants and to take measures to improve their integration and inclusion, with particular reference to, inter alia, access to justice. The guiding principles set out in the final draft of the Global Compact for Safe, Orderly and Regular Migration agreed by States on 13 July 2018, which are fundamental to managing migration, include respect for the rule of law, due process and access to justice. Accordingly, States have committed to investing in programmes that facilitate access to justice, providing legal information and guidance to enable migrants to file complaints in cases of violations of their human rights, facilitating access to justice for victims of trafficking, and providing access to justice for all migrants subject to detention in transit and destination countries.

74. Furthermore, target 16.3 of the 2030 Agenda for Sustainable Development refers to promoting the rule of law and ensuring equal access to justice for all, which includes migrants. In this regard, the Special Rapporteur reiterates the importance of developing a 2035 agenda for facilitating human mobility, as proposed by his predecessor,[75] which would also serve as a reference for the implementation of the Global Compact on Safe, Orderly and Regular Migration. In particular, goal 5 of the agenda for facilitating human mobility refers to providing effective access to justice for all migrants.

75. In order to provide effective access to justice for all migrants, States should:

(a) Ensure equal access for migrants and provide them with reliable legal information, competent and affordable legal representation, effective legal aid, and competent translation and interpretation services; waive legal fees for all migrants who cannot afford them; and protect migrants by regularizing their

[74] Submission by Global Alliance Against Traffic in Women.

[75] A/72/173.

status, giving them special visas or taking other protective measures for victims of trafficking and forced labour;

(b) Ensure and facilitate equal and effective access for all migrants whose labour or human rights are violated to independent, competent, fair, effective and accountable judicial and quasi-judicial institutions;

(c) Ensure access for all migrants in detention, regardless of their status and circumstances, to competent lawyers, interpreters and translators, legal aid and judicial assistance programmes, NGOs, consular authorities and asylum procedures, and independent external monitoring of all migrant detention facilities;

(d) Empower migrants to avail themselves of legal remedies, and strengthen their ability to exercise influence upon law-making and law-implementing processes and institutions;

(e) End discrimination and inequalities for migrants in the legislation, policies and practices that regulate access to justice;

(f) Strengthen the capacity of courts, tribunals, national human rights institutions, ombudspersons and other mechanisms for human rights protection and dispute resolution to ensure accountability for violations of the rights of migrants;

(g) Adopt effective measures to reduce crime and violence against migrants during their journeys and in destination countries, and ensure effective protection and assistance to victims of exploitation and abuse;

(h) Establish firewalls between immigration enforcement and public services to allow access to justice for all migrants without fear of being reported, detained and deported;

(i) Ensure that labour inspections focus on employers who exploit migrant workers, rather than on the workers;

(j) Establish bilateral agreements to ensure that migrants who return to their country of origin have access to justice in the country of employment, in particular to report abuse and claim unpaid wages and benefits.

76. **With regard to migrant boys and girls States should:**

(a) Adopt and implement legislation prohibiting the detention of migrant boys and girls because of their migration status or that of their family, and adopt alternative family- and community-based measures;

(b) Facilitate access to mechanisms for submitting formal complaints and reports that are adapted to the needs of boys and girls, in cases of violations of their rights;

(c) Provide them with information — that is age-appropriate and tailored to their needs — on their rights and how to obtain redress;

(d) Give due consideration to the views of boys and girls and safeguard their privacy and confidentiality when they participate in judicial proceedings, in order to prevent their victimization or revictimization;

(e) Ensure that, as soon as possible, a legal representative is appointed for all children, free of charge, and a trained guardian is appointed for unaccompanied and separated children;

(f) Adopt effective procedures for determining children's best interests, as well as mechanisms for referral to the child protection system when necessary;

(g) Train and educate judicial and administrative officials in the human rights and needs of boys and girls.

77. **With regard to migrant women States should:**

(a) **Adopt strategies to ensure the equal access of women to justice mechanisms;**

(b) **Take appropriate measures to create supportive environments that encourage women to claim their rights, report crimes committed against them and actively participate in criminal proceedings;**

(c) **Take effective measures to protect women against secondary victimization in their interactions with law enforcement and judicial authorities;**

(d) **Review and monitor all judicial procedures to ensure that they do not directly or indirectly discriminate against women and eliminate any discrimination against women in penalties;**

(e) **Train and raise the awareness of justice system personnel regarding women's human rights and the principle of equality.**